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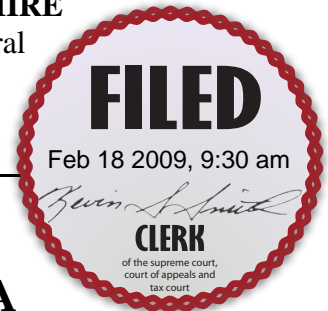
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**IN THE
COURT OF APPEALS OF INDIANA**

DONALD E. COLLOPY III,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 81A01-0806-CR-270

APPEAL FROM THE UNION CIRCUIT COURT
The Honorable Matthew R. Cox, Judge
Cause Nos. 81C01-0204-CF-62 and 81C01-0411-CM-300

February 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following his plea of guilty to a probation violation, the trial court revoked Donald E. Collopy III's probation. He raises three issues, of which we find one dispositive: whether the trial court erred when it revoked Collopy's probation in cause number 81C01-0204-CF-62 ("-62") for an act that occurred after his probationary period in that cause had expired.

We reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

This case presents a consolidated appeal of two convictions. On February 25, 2005, Collopy pleaded guilty under cause number -62 to fraud on a financial institution, and the trial court sentenced him to four years of incarceration, with two of those years suspended to probation. That same day, at the same hearing, Collopy pleaded guilty under cause number 81C01-0411-CM-300 ("-300") to battery, and the court sentenced him to 365 days with all time suspended to probation. The sentences were ordered to run consecutively.

On March 6, 2008, Collopy submitted to a urine screen and tested positive for cannabinoids and carboxy THC, or marijuana use. Thereafter, on March 25, 2008, the State filed a petition to revoke Collopy's probation in cause numbers -62 and -300. An initial hearing was held on March 31; Collopy appeared pro se,¹ and he admitted to the probation violation. At the conclusion of the hearing, the trial court asked the State to determine what

¹ During the hearing, Collopy acknowledged on several occasions his understanding that he had a right to have counsel present but declined an attorney and elected to proceed pro se. On appeal, Collopy alleges that the trial court erred when it allowed him to proceed without counsel. Because we find the probation revocation issue dispositive, we do not reach that issue.

amount of time remained available for revocation.² *Tr.* at 8-9. Thereafter, on April 2, 2008, the Union County probation department advised the court by memorandum that Collopy had 396 days remaining of suspended time available for revocation in cause -62; the memo made no mention of -300. *See Tr.* at 14 (probation officer testified that Collopy has 396 days remaining of suspended time). In the April 2 memo, the probation department also reported that Collopy's "end date" for -62 was February 29, 2008. *Appellant's App.* at 23.

At the April 11, 2008 dispositional hearing, the State asked the trial court to revoke the remaining 396 days of -62 and the 365 days of -300. After receiving argument from both parties,³ the trial court revoked 396 days of Collopy's suspended sentence in -62, but tolled Collopy's probation in -300, noting that his probation in that case would recommence after his release from incarceration in -62. Collopy now appeals.

DISCUSSION AND DECISION

Collopy argues that the trial court erred in revoking his probation. A probation revocation hearing is in the nature of a civil proceeding, and the State must prove the alleged violation only by a preponderance of the evidence. Ind. Code § 35-38-2-3(e); *Dawson v. State*, 751 N.E.2d 812, 813-14 (Ind. Ct. App. 2001). The decision to revoke is a matter within the sound discretion of the trial court. *Dawson*, 751 N.E.2d at 814. We will affirm a

² We note that Collopy's probation had been revoked on a prior occasion. Specifically, 180 days of Collopy's probation in -62 and -300 was revoked on November 26, 2007, pursuant to a plea agreement. *Appellant's App.* at 1-4; *Appellant's Br.* at 2.

³ We note that Collopy appeared pro se at this hearing, as he had at the initial probation revocation hearing. Although Collopy raises an appellate issue alleging that the trial court erred when it allowed him to proceed pro se, we find that our resolution of the probation violation issue is dispositive and, therefore, do not reach the issue of whether Collopy properly waived his right to counsel.

decision to revoke probation if there is substantial evidence of probative value to support the trial court's conclusion that a probationer has violated any condition of probation. *Id.*; see also *Marsh v. State*, 818 N.E.2d 143,144 (Ind. Ct. App. 2004) (appellate court reviews decision to revoke probation for abuse of discretion, which occurs if decision is against logic and effect of facts and circumstances before trial court). Here, Collopy argues that it was error to revoke his probation because the alleged violation, when he tested positive for marijuana on March 6, 2008, occurred outside the probationary period for -62. Collopy is correct.

A trial court may revoke a person's probation if:

- (1) *the person has violated a condition of probation during the probationary period*; and
- (2) the petition to revoke probation is filed during the probationary period or before the earlier of the following:
 - (A) One (1) year after the termination of probation.
 - (B) Forty-five (45) days after the state receives notice of the violation.

Ind. Code § 35-38-2-3(a) (emphasis added). A defendant's "probationary period" begins immediately after sentencing, even if his actual probation begins at a later date, and ends at the conclusion of the probationary phases of the defendant's sentence. *Crump v. State*, 740 N.E.2d 564, 568 (Ind. Ct. App. 2000), *trans. denied* (2001) (probationary period begins immediately after sentencing and ends at conclusion of probationary phases of his sentence).

In this case, the court based its probation revocation upon Collopy's admission to the March 6, 2008 failed urine test. However, Collopy's probation in -62 ended February 29,

2008. Therefore, Collopy was not in his “probationary period” when he tested positive for marijuana on March 6, 2008. A trial court “may not revoke probation for events occurring after the original term of probation.” *Dawson*, 751 N.E.2d at 814 (citing *Slinkard v. State*, 625 N.E.2d 1282, 1284 (Ind. Ct. App. 1993)). Consequently, the trial court erred when it revoked Collopy’s probation in -62 for an act that occurred after the probationary period in that case had expired.

While the State concedes that the violation occurred outside Collopy’s probationary period, it contends that the issue is moot, and no relief can be granted, because Collopy has already served the executed time in -62. We reject the State’s argument, however, because it overlooks the other consequences of probation revocation, such as the fact that such revocation will thereafter be included in a defendant’s criminal history.

Collopy urges that “merely vacating the sentence imposed in [-62] could not be an adequate remedy since [he] has served time incarcerated for this alleged probation violation since prior to April 11, 2008,” and he should be credited in -300 for the time served pursuant to the erroneous revocation. *Appellant’s Br.* at 10. He maintains that “fairness demands” this result. *Id.* We agree. Finding as we do that the probation revocation was in error, we reverse and remand with instructions that the trial court enter all necessary orders consistent with this opinion, including determining the credit time that Collopy is entitled to in -300.

Reversed and remanded.

BAKER, C.J., and NAJAM, J., concur.